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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. _____

TERRY & WRIGHT, INC. and
FEDERAL INSURANCE COMPANY, - - - *Petitioners,*

v.

HUGH D. BLANCHARD and CULLEN JENKINS, d b a Blanchard & Jenkins Construction Company, - - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on May 11, 1964.

CITATIONS TO OPINIONS BELOW.

The Memorandum and Order of the District Court is unreported and is printed in the Appendix hereto, pages 35-40, and contained in the Certified Record, pages 38a-43a. The Opinion of the Circuit Court of

Appeals is printed in the Appendix, pages 41-45, and is unreported at this time. The Opinion of the Circuit Court of Appeals may also be found at the end of the Certified Record.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Circuit Court of Appeals was entered on May 11, 1964 (rear of Certified Record, Appendix, page 46). The jurisdiction of this Court is invoked under 28 USCA 1254. Certiorari is sought because the question of federal law involved concerns a serious matter involving the construction of the Federal Rules of Civil Procedure and the Federal Statutes concerning the power of a District Court to amend a Complaint after judgment and after time for appeal has expired. Certiorari is also sought because the question of finality of judgments in the United States District Courts under Rule 60 (b) (4), Federal Rules of Civil Procedure, should be settled. In addition, the holdings of the District Court and the Circuit Court of Appeals are in conflict with the holding of this Court in *American Fire & Casualty Company* v. *Finn*, 341 U. S. 6, 95 L. Ed. 702, 71 S. Ct. 534, and *Barnard-Curtiss Co.* v. *U. S.* (C. A. 10th), 252 F. 2d 94, in that it gives to the District Court a wrongful extension of federal jurisdiction denied to it by Congress.

QUESTIONS PRESENTED FOR REVIEW.

1. When the plaintiffs, Blanchard and Jenkins, who were Kentucky citizens, did not allege that the principal place of business of the defendants, Terry & Wright and Federal Insurance Company, was not in Kentucky, and plaintiffs did not allege the necessary allegations under 40 USCA 270 a, 270 b (a, b), 270 c concerning the Miller Act, and it was proven, after jurisdiction being placed in issue by the Answer, that the principal place of business of one defendant was in Kentucky, did the District Court have jurisdiction on the basis of diversity of citizenship?

2. Since judgment had been rendered and time for appeal had lapsed, the judgment thereby became a final judgment, and did said final judgment terminate the jurisdiction of the District Court to permit the filing of a Third Amended Complaint presenting issues under the Miller Act that were not tried out or put in issue previously?

3. Should Rule 60, Federal Rules of Civil Procedure, be so construed as to permit the filing by the District Court of a Third Amended Complaint after final judgment, and after the District Court had lost jurisdiction except for the purposes set forth in Rule 60?

4. Does 28 USCA 1653 authorize the filing of the Third Amended Complaint after final judgment and after the District Court has lost jurisdiction?

5. Did the District Court properly allow the filing of the Third Amended Complaint when it added a new party plaintiff and when it failed to allege, pursuant to 40 USCA 270 b (b) that the suit had been commenced within one year after the final settlement of the contract obligations between Terry & Wright and the United States engineers?

STATUTES INVOLVED.

The statutory provisions involved are *28 USCA* 1332 which is printed in Reasons for Granting the Writ, pages 11-12; *Rule 15(a) and (b)* and *Rule 60, Federal Rules of Civil Procedure* printed in the Appendix, pages 50-52; *28 USCA* 1653 printed in the Reasons for Granting the Writ, page 26; *40 USCA 270 b (b)*, printed in the Reasons for Granting the Writ, page 29; *40 USCA 270 a, 270 b (a), 270-c*; *28 USCA 2107*; *28 USCA 452* all printed in the Appendix on pages 47-50.

STATEMENT OF THE CASE.

The plaintiffs in this action filed the Complaint against the defendants, Terry & Wright, Inc. and Federal Insurance Company on December 11, 1959 (1a). Jurisdiction of the District Court was alleged to be on the basis of diversity of citizenship (10a-11a) pursuant to the provisions of *28 USCA* 1332. The Complaint alleged (10a), as to jurisdiction, the following:

> "1. Plaintiffs are citizens and residents of the State of Kentucky. The defendant, TERRY & WRIGHT, INC., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of said State. The Defendant, FEDERAL INSURANCE COMPANY, is a corporation created and existing under the laws of the State of New York and is a citizen and resident of said State.
>
> "2. The matter in controversy exceeds the sum of TEN THOUSAND DOLLARS ($10,000), exclusive of interests and costs."

The Complaint went on further to allege that the defendant, Terry & Wright, had agreed to construct a dam and spillway at the Rough River Reservoir in Grayson County, Kentucky, for the United States of America, and that the Federal Insurance Company had executed, as surety, a bond to the United States of America guaranteeing the performance of the contract by Terry & Wright and the prompt payment by Terry & Wright of all claims for labor and material used in the performance of the contract (11a). The Complaint further alleged that the plaintiffs furnished filter material to Terry & Wright as well as certain machinery and equipment together with personnel to operate same, and demanded judgment against Terry & Wright and the Federal Insurance Co., and each of them, in the sum of $47,764.90 plus $3,415.21 together with interest (11a-12a).

On January 2, 1960 (13a), the defendants filed their Answer and Counterclaim and moved to dismiss the Complaint for lack of jurisdiction, as follows (13a):

> "1. Terry & Wright, Inc., moves the Court to dismiss plaintiffs' complaint because it does not state a cause of action on which relief may be granted and because this Court has no jurisdiction of this cause of action."

The Opinion of the Circuit Court, wherein it states on page 42, "In this motion to vacate defendants asserted for the first time that the principal place of business of the contractor was Kentucky, which was the plaintiffs' place of residence: . . . " is not cor-

rect because lack of jurisdiction was asserted in the Answer.

In addition, the defendants admitted the allegations of paragraphs 1, 2, 3, 4 and 5 of the Complaint and denied every other allegation therein (13a). In addition, accord and satisfaction (13a) by means of a release and payment, were set forth in the affirmative (13a-14a). The defendant, Terry & Wright, filed its Counterclaim alleging failure on behalf of the plaintiff to furnish the materials required under the contract and seeking damages in the amount of $63,776.24 due to the plaintiffs' failure (15a).

On July 9, 1960 (16a) the plaintiffs filed a reply to Terry & Wright's Counterclaim denying the allegations of the Counterclaim while admitting the basic contract between Terry & Wright and Blanchard & Jenkins Construction Company (16a).

In the summer of 1960, August 18, 1960 (17a), the plaintiffs moved to amend their Complaint, which Motion was sustained setting forth additional alleged breaches of contract as to Terry & Wright and seeking additional damages (19a).

On November 24, 1961, the defendants filed an Amended Answer in response to the Amended Complaint (20a-21a) pleading accord and satisfaction and a general denial. On November 19, 1962, plaintiffs filed an Amended Reply to the Counterclaim setting forth estoppel (22a).

This case was the first assigned for trial on May 16, 1960 (3a). However, on May 9, 1960 (3a) the case was taken from the trial docket. A pre-trial conference

had been held initially on this action on February 25, 1960 (2a).

On September 13, 1960, the case was assigned for a pre-trial conference on September 26, 1960 (3a) which was continued to September 28, 1960 (4a), wherein the case was assigned for trial for November 9, 1960 (4a). However, the case was not tried on that date.

On February 10, 1961, the case was assigned for a pre-trial conference on February 23, 1961 (4a). However, the pre-trial conference was cancelled and the case continued generally on the docket (4a). On September 26, 1961, a pre-trial Order was entered assigning the case to November 30, 1961 for trial (4a). However, the case was not tried at that date, but set down on terms (4a).

Another pre-trial conference was had on the case on February 19, 1962 and the case was assigned for trial on May 1, 1962 (15a). The case was removed from the trial docket and reassigned for a jury trial on May 29, 1962 (5a).

By agreement of the parties, the case was taken from the trial docket and was not tried on May 29, 1962, but the case was reassigned on September 25, 1962 for a jury trial November 19, 1962 (5a).

This action came on for trial November 19, 1962 (24a) in which a jury was empaneled and on November 21, 1962 returned a verdict in favor of the plaintiffs in the amount of $17,899.92 (26a).

On November 21, 1962 the plaintiffs moved and secured an Order authorizing them to file their Second

Amended Complaint to conform to the evidence (23a) pleading a new contract or novation and seeking additional damages.

On November 23, 1962 Judgment was entered against the defendants based upon the verdict (26a). On November 29, 1962 (27a) defendants moved to set aside the verdict and to enter judgment for the defendants' notwithstanding the verdict. On March 6, 1963 (30a) this Motion was overruled by the Trial Court.

On March 9, 1963 (31a) the defendants served notice that they would move the Court to dismiss the action because of lack of jurisdiction on March 15, 1963. On March 15, 1963, the Motion of the defendants (31a) was filed moving to dismiss the case because of lack of jurisdiction in that there was no jurisdiction alleged in the Complaint and lack of jurisdiction was affirmatively proved during the trial.

In support of the Motion, defendants filed excerpts of testimony taken during the trial of Mr. L. H. Terry wherein he testified (32a-33a) that he was President and General Manager of Terry & Wright. He further stated without contradiction that Terry & Wright is incorporated in the State of Michigan and that its principal office or place of business is on Poplar Level Road in Louisville, Kentucky. The principal office and place of business has been located in Louisville, Kentucky for nine or ten years, and for the last nine or ten years, Terry & Wright has not done any business in Michigan (33a). All of Terry & Wright's business has been conducted from its Louisville office (33a).

On April 10, 1963 (8a, 35a) the plaintiffs moved to file their Third Amended Complaint and tendered said Third Amended Complaint (36a). The matter came on for argument before the Trial Court on April 12, 1963 (8a, 34a) and the Court heard argument but requested briefs from the parties. The Third Amended Complaint (36a) purported to amend the Complaint to one under the Miller Act, more properly stated under 40 U.S.C. 270 A, 270 B, 270 C. It was then sought to change the title of the case so that it would read the United States of America for the use and benefit of Blanchard & Jenkins as required under 40 U.S.C. 270 B (b) (36a). Allegations were also made concerning the Federal Insurance Company as to the bond required under the Miller Act by 40 U.S.C. 270 (a) (36a). In addition, there was alleged that the plaintiffs were not paid in full prior to the expiration of a period of ninety days after the day on which the last of the labor and materials were furnished and supplied defendants for which this claim is made (36a) and further alleged (37a) that the date of the final settlement of the contract between the plaintiffs and Terry Wright, Inc. was not more than one year prior to December 11, 1959, the original commencement date of these proceedings (37a).

The Circuit Court, in its Opinion at page 43, stated that the Third Amended Complaint ". . . did not change in any respect the substantive allegations setting forth plaintiffs' claim." As shown above, this is not accurate because a new party plaintiff was added and

in addition allegations concerning payment and settlement were made, which were not previously in issue.

On June 17, 1963 (37a), the Trial Court entered its Memorandum and Order overruling the defendants' motion to dismiss for want of jurisdiction, sustaining the Motion of plaintiffs to file their Third Amended Complaint (37a-43a).

From the Order dated June 14, 1963, and entered June 17, 1963, refusing to set aside the Judgment as void and permitting the filing of the Third Amended Complaint after Judgment, the defendants filed a Notice of Appeal (43a), and executed a supersedeas bond (45a).

On May 11, 1964, the United States Court of Appeals for the Sixth Circuit entered its Opinion and on the same date entered its judgment (see Certified Record and Appendix, pages 41-45). The Opinion misstates the facts in that it ignores the fact that the issue of jurisdiction was raised in the Answer filed by the defendants (13a); misstates the facts as to the Third Amended Complaint failing to present new issues; ignores the requirements of *40 USCA* 270 a, b and c as to the necessary allegations to assert jurisdiction and a valid complaint under the Miller Act; and extended the jurisdiction of the District Court beyond the limits given to said Court by Congress in permitting this Amended Complaint to be filed presenting issues not tried and ignoring the fact of the finality of the judgment contrary to the provisions of *American Fire & Casualty Company* v. *Finn, supra.*

REASONS FOR GRANTING THE WRIT.

1. When the plaintiffs, Blanchard and Jenkins, who were Kentucky citizens, did not allege that the principal place of business of the defendants, Terry & Wright and Federal Insurance Company, was not in Kentucky, and plaintiffs did not allege the necessary allegations under 40 USCA 270 a, 270 b (a, b), 270 c concerning the Miller Act, and it was proven, after jurisdiction being placed in issue by the Answer, that the principal place of business of one defendant was in Kentucky, did the District Court have jurisdiction on the basis of diversity of citizenship?

The Complaint in this action was filed on December 11, 1959 and it was alleged (10a-11a) that the defendant, Terry & Wright, Inc., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of that State. It was further alleged that the Federal Insurance Company is a corporation created and existing under the laws of the State of New York and is a citizen and resident of that State. The defendant, in its Answer, alleged that there was no jurisdiction in the Court of this cause of action (13a) and proved by evidence (32a-33a), that while Terry & Wright was incorporated in Michigan its principal place of business was in Louisville, Kentucky, and it had not done any business in Michigan for nine or ten years.

28 USCA 1332 provides as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State, and foreign states or citizens or subjects thereof; and
(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.

"(d) The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

As indicated in the caption to the Complaint (10a), the plaintiffs, Hugh D. Blanchard and Cullen Jenkins, d b a Blanchard & Jenkins Construction Company, are citizens of Kentucky (10a). Thus, it was established there was clearly no diversity of citizenship between the plaintiffs and defendant, Terry & Wright as required by 28 USCA 1332 since the principal place

of business of Terry & Wright, Inc. was in Kentucky and the plaintiffs were citizens of Kentucky.

The Complaint having failed to allege that the Federal Insurance Company did not have its principal place of business in the State of Kentucky, and no proof having been offered on the subject to substantiate the jurisdiction, there was a presumption that there was no diversity of citizenship as to the Federal Insurance Company. In *Bell* v. *Gray* (E.D., Ky.), 191 F. Supp. 328, 329, affirmed (C.A. 6th) 287 F. 2d 410, this rule is set forth as follows:

> "The statement of plaintiffs' counsel in his brief that this is a court of general jurisdiction should be corrected. Every federal court is a court of limited, not of general, jurisdiction. All presumptions are against the jurisdiction of such a court, so that the facts disclosing the jurisdiction must affirmatively appear upon the record. Turner v. Bank of North America, 1799, 4 Dall. 8, 1 L. Ed. 718; McNally v. Jackson, D.C., 7 F. 2d 373; Swanson v. United States, 9 Cir., 224 F. 2d 795, 15 Alaska 608. The motion to dismiss the complaint should be sustained."

Federal courts are courts of limited jurisdiction such as Congress has deemed proper to grant them under a valid statute. *Peoples Bank* v. *Calhoun*, 102 U. S. 256, 260-261, 26 L. Ed. 101, 102. Thus, the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a Federal Trial Court to amend a Complaint and allow

a judgment to stand where there is no jurisdiction works a wrongful extension of federal jurisdiction and gives district court power that the Congress has denied them.

"In the present action under 28 USCA 1332 (c) to give the District Court diversity jurisdiction over an action in which there are corporate defendants, the plaintiffs must set forth affirmatively in the Complaint and must prove in the action not only the state by which the corporations were incorporated, but also state and prove where each corporation has its principal place of business. *Stenhouse* v. *Jacobson* (N.D., Calif.), 193 F. Supp. 694, 695-696; *Brandt* v. *Bay City Super Market* (N.D., Calif.), 182 F. Supp. 937, 939, 940; *Browne* v. *Hartford Fire Ins. Co.* (N.D., Ill.), 168 F. Supp. 796, 799; *Washington-East Washington Joint Authority* v. *Roberts and Schaefer Co.* (W.D., Penn.), 180 F. Supp. 15, 16-17; *Roseberry* v. *Fredell* (E.D., Ky.), 174 F. Supp. 937, 939-940; *Cherry* v. *Alcoa Steamship Co.* (D., Md.), 202 F. Supp. 663, 664; *F. & L. Drug Corp.* v. *American Central Insurance Co.* (D., Conn.), 200 F. Supp. 718, 720-721, 723-724; *Maryland Casualty Company* v. *Baker* (E.D., Ky.), 196 F. Supp. 234, 236; *Paramount Packaging Corp.* v. *H. B. Fuller Company of New Jersey* (E.D., Penn.), 190 F. Supp. 178, 179; *Wright* v. *Governor Hotel Operating Co.* (E.D., Ill.), 184 F. Supp. 156, 157; *Adams* v. *Ralph L. Smith Lumber Co.* (N.D., Calif.), 181 F. Supp. 729, 730; *Gobet* v. *International Hotels Corp.* (D., Puerto Rico), 184 F. Supp. 171, 174; *1 Moore's Federal Practice*, Sec. 0.60 (8.-4), p. 642;

see also p. 14. *1962 Supplement under page 664, note 18*; p. 11. *1962 Supplement under page 644, note 34*; *Kelly* v. *U. S. Steel Corp.* (C.A. 3rd, 1960) 284 F. 2d 850; *Gilardi* v. *Atchison, Topeka and Santa Fe Ry. Co.* (N.D., Ill.), 189 F. Supp. 82, 85; *Vol. 1A, Federal Practice & Procedure*, Barron & Holtzoff (Rules Edition), Sec. 254, p. 45; *note 705 under 28 USCA 1332*, 1963 Cumulative Annual Pocket Part, p. 190.

There can be no diversity of citizenship if the plaintiff is of the same state citizenship as any one of the defendants, since diversity must be complete. *Baltimore and Ohio R. Co.* v. *City of Parkersburg*, 268 U. S. 35, 45 S. Ct. 382, 69 L. Ed. 834; *Walker* v. *Bank of America* (C.A. 9th), 268 Fed. 16, 22. As there is no diversity here the judgment is void. *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 74-75, 62 S. Ct. 15, 19, 86 L. Ed. 48.

The question of federal jurisdiction of the Trial Court cannot be waived and can be reviewed at any time. *Parker* v. *Ormsby*, 141 U. S. 81, 35 L. Ed. 654, 11 S. Ct. 961; *Birmingham Post Co.* v. *Brown*, 217 F. 2d 127; *Canadian Indemnity Co.* v. *Republic Indemnity* (C.A. 9), 222 Fed. 601, 603. See also *Rader* v. *Manufacturers Casualty Ins. Co.* (C.A. 2), 242 F. 2d 419, 427; *American Fire & Casualty Company* v. *Finn*, 341 U. S. 6, 95 L. Ed. 702, 71 S. Ct. 534.

The Court of Appeals took the position that the Complaint, without any amendments, stated a cause of action under the Miller Act. This holding is clearly erroneous because first the action is not in the name of the proper party plaintiff as required by [illegible] USCA

270 b (b) in that the action is not brought in the name of the United States and the Complaint does not so allege. Moreover, this Statute requires that there must be an allegation that the suit was not commenced after the expiration of one year from the final date of the settlement of the contract. *Fleischmann Construction Co. v. United States to the use of Forsberg*, 270 U. S. 349, 358, 46 S. Ct. 284, 70 L. Ed. 624, 630. The limitation provision is a condition on the right to sue and, therefore, must appear affirmatively in the Complaint. *Baker Contract Company* v. *United States* (C.A. 4th), 204 F. 390, 397; *American Surety Company of New York* v. *Wheeling Structural Steel Company* (D.C., W. Va.), 26 F. Supp. 395, 399, reversed on other grounds 114 F. 2d 237; *United States for the use of Ross* v. *Somers Construction Company* (D.C., Del.), 184 F. Supp. 563, 566; *Antrim Lumber Company* v. *Hannan* (C.A. 8th), 18 F. 2d 548, 550; *Salyers* v. *United States* (C.A. 8th), 257 F. 2d 255, 259; *United States* v. *Merrick* (D.C., N.Y.), 215 F. 2d 256, 257. Thus, no cause of action is stated in the original complaint under the Miller Act.

The holding of the Circuit Court that the United States is merely a nominal party is contrary to this Court's finding in *United States Fidelity & Guaranty Company* v. *United States for the benefit of Kenyon*, 204 U. S. 349, 27 S. Ct. 381, 383, 51 L. Ed. 516, wherein it was held that the United States was the real party to the action as it is the principal party to the contract and the Act is for the purpose of providing that the interest of the government in construction of public

works will be subserved as contractors for such works are able to obtain materials and supplies promptly and with certainty. Thus, by the passage of the Miller Act, Congress has acted to show the importance of assuring those who furnished such materials and supplies that the government will assert its power directly for their protection. *Davidson Bros. Marble Company* v. *United States ex rel. Gibson*, 213 U. S. 10, 29 S. Ct. 329, 53 L. Ed. 675. The holding in the present case by the Sixth Circuit conflicts with the holding in *Barnard-Curtiss Company* v. *United States for the use and benefit of D. W. Falls Construction Company* (C.A. 10th), 252 F. 2d 94, 95. See also *United States for use and benefit of Browne and Bryan* v. *Massachusetts Bonding & Insurance Company* (D.C. N.Y.), 29 F.R.D. 162.

Thus, it is clear that in the Complaint as filed the allegations were not sufficient for jurisdiction under diversity of citizenship or under the Miller Act. Therefore, the Circuit Court's Opinion is erroneous in so holding and is in conflict with the Tenth Circuit's Opinion in *Barnard-Curtiss Co.* v. *United States for the use and ben't of D. W. Falls Construction Co.*, *supra*, and the Opinion of this Court as set forth in *United States Fidelity & Guaranty Co.* v. *United States for the Use of Kenyon*, *supra*. Thus, for the purpose of clarifying the status of actions under the Miller Act as well as under the statutes dealing with diversity of citizenship and in view of the conflict of decisions, certiorari should be granted.

2. Since judgment had been rendered and time for appeal had lapsed, the judgment thereby became a final judgment, and did said final judgment terminate the jurisdiction of the District Court to permit the filing of a Third Amended Complaint presenting issues under the Miller Act that were not tried out or put in issue previously?

In considering the authority of the Trial Court as to the question of whether or not the Motion made by the appellant to declare the Judgment void should have been sustained and the third amendment to the Complaint not allowed the following dates should be considered:

a. Complaint filed December 11, 1959 (10a).

b. Answer and Counterclaim filed January 20, 1960 (13a).

c. Reply filed by plaintiff January 9, 1960 (16a).

d. First Amended Complaint filed September 28, 1960 (18a).

e. Amended Answer filed November 24, 1961 (20a).

f. Amended Reply filed November 19, 1962 (22a).

g. Trial of case November 19, 20, 21, 1962 wherein verdict for plaintiff was returned (24a-25a).

h. Second Amended Complaint to conform to the evidence filed November 21, 1962 (23a).

i. Judgment entered November 23, 1962 in favor of plaintiffs, Hugh D. Blanchard and Cullen Jenkins, d b a Blanchard & Jenkins Construction Company (26a).

j. Defendant's Motion for Judgment in accordance with its Motion for Directed Verdict filed November 29, 1962 (27a).

k. Court's Order overruling defendant's Motion to set aside verdict and enter Judgment for defendant entered March 6, 1963 (30a).

l. Notice filed March 9, 1963 and Motion filed March 15, 1963 to set aside Judgment and enter Judgment for defendants, because of lack of jurisdiction (31a).

m. Filing Motion to Amend Complaint on April 10, 1963 and tendering Third Amended Complaint which was filed on June 14, 1963 (35a-36a).

The Judgment in this action was entered on November 23, 1962. Defendant's Motion for New Trial and for Judgment notwithstanding the verdict was overruled on March 6, 1963. No Notice of Appeal was filed from the Judgment entered November 23, 1962. The plaintiffs move to file their Third Amended Complaint April 10, 1963, more than thirty days after the Motion for Judgment notwithstanding the verdict was overruled. Thus, the Judgment of November 23, 1962, had become final and there was no right of appeal to the Court of Appeals in the defendants. Thus, pursuant to the provisions of 28 USCA 2107, there is no right of appeal from the Judgment of November 23 1962 and it had become final.

Although not so stating by moving to amend, the appellees have attempted to avail themselves of Rule 60, Federal Rules of Civil Procedure which is the only manner in which this action may now be reopened. Rule 60 does not apply for there are no facts that bring the case within its terms.

It is well settled that after the Judgment has become final, the Complaint may not be amended except as provided for by Rule 60, Federal Rules of Civil Procedure. However, Rule 60, *supra*, by its terms does not apply. In *T. S. C. Motor Freight Lines* v. *Leonard-Truck Lines*, 4 F.R.D. 366, 368, D.C., W. D. La., it was held:

> "In the present case the judgment was signed on November 27th and filed on the 29th whereas the proposed amendment was filed on December 29th, thirty days after 'entry' of the judgment. The time had passed therefore within which the parties could ask, or the court of its own motion could grant, a new trial, except for newly discovered evidence. The only remaining relief was by appeal, except as to clerical errors, etc. If the court was powerless to reopen issues upon which it had rendered final judgment, how could it entertain an amendment which, if allowed, would have the effect of setting at naught that judgment? The rules of Federal Procedure do not fix the time for perfecting appeals (this is still governed by Sec. 230 of 28 U.S.C.A.), except that rule 73 requires the filing of the transcript with the appellate court within forty days after the notice of appeal provided therein. That section, 230 of 28 U.S.C.A., declares that no appeal 'shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.' To hold that plaintiff could amend its complaint on the ground attempted in this case within a period of thirty days would be to concede that it could also be done for the full three months, unless, in the meantime, an appeal

had been perfected, notwithstanding the provisions of Rule 59 limiting the time for entertaining motions for a new trial to ten days when not based upon newly discovered evidence.

"While the rules of civil procedure were intended to simplify the practice in the Federal courts by dispensing with unnecessary formalities and technicalities and to serve the ends of justice, rather than to thwart them, they nevertheless were bound to, and I think did, establish certain standards or limitations by which they could be expedited and, to that end, laid down the steps and periods within which thy should be taken, such as amendments, entry of judgments, filing of motions for new trials, taking and perfecting appeals, and which, if not timely followed, would preclude relief by those means, object only to the exceptions specifically named.

"My conclusion is that the attempted amendment in this case came too late and the plaintiff is relegated to an independent suit to recover the damages alleged for breach of the contract. The amendment will be denied."

In the present case, the diversity basis for jurisdiction was relied upon in the Complaint. With the right of appeal terminated, there is no right to amend the Complaint as the jurisdiction of the Trial Court has terminated. Plaintiffs' Motion to amend is not a Motion to conform to the evidence, and, thus, Rule 15b, Federal Rules of Civil Procedure, is not applicable. Certainly the amendment which sets up new issues under the Miller Act, and a new party plaintiff, namely the United States, is not proper because there was no

consent to try any of these issues. Amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof. *Simms* v. *Andrews* (C.A. 10th), 118 F. 2d 803, 807. Furthermore, the right of appeal has been closed, and, thus, the Motion to amend after Judgment is improper because the Trial Court has lost jurisdiction. *Knox* v. *First Security Bank of Utah* (C.A. 10th), 206 F. 8d 823, 826

In *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93, 94, cert. denied 342 U. S. 812, the same question was before the Court as to the right to amend after judgment under Rule 15(a):

> "The plaintiff points out that Rule 15 (a) on its face sets up no period of limitation. He takes the position that an amendment therefore may be effected under the rule at any time before the first responsive pleading. The defendants contend that no amendment under Rule 15 (a) is permissible after a final Judgment. An analogy is supplied by judgment for the defendant on a demurrer at common law where the plaintiff was not permitted to plead over and his suit was forever lost. The defendants endeavor to support this position on the ground that the Federal Rules of Civil Procedure have given such a wide range of weapons to a plaintiff that amendments may not be made after judgment except under Rules 59(e) and 60 (b). The plaintiff, as we have indicated, does not invoke these rules.
>
> "... He has filed a naked motion to amend. Since the plaintiff is not entitled to amend as a matter of right and since he has supplied no field

in which the court below properly could have exercised its discretionary power, the judgment will be affirmed."

The same position was taken in *Ricali Trucking Corp.* v. *New York Shipping Association*, 167 F. Supp. 943, 945 (C.D., N.Y.), wherein it was stated as follows:

> "While amendments are liberally granted in the federal court, I can find no basis for permitting an amended and supplemental pleadings in an action which has been dismissed more than a year ago by a judgment entered in this court, without the right of appeal ever having been exercised. United States v. Newbury Mfg. Co., 1 Cir., 1941, 123 F. 2d 453; Brill v. General Industries Enterprises, Inc., 3 Cir., 1956, 234 F. 2d 465; Kelly v. Delaware River Joint Commission, 3 Cir., 187 F. 2d 93, certiorari denied, 1951, 342 U. S. 812, 72 S. Ct. 25, 96 L. Ed. 614. This litigation has been terminated by the dismissal of the plaintiff's action and there is nothing pending in this district so as to permit plaintiff to restate or update its complaint. While there is no application for the exercise of my discretion pursuant to Fed. R. Civ. P. 60 (b) subdivisions (1), (2) or (3), 28 U.S.C.A., for an order setting aside the judgment entered on October 8, 1956, it is clear upon a reading of these sections that any application thereunder must be made within one year from the date of the entry of the judgment. Consequently, the motion, even if construed as a motion pursuant to Rule 60 (b) would be untimely."

Thus, with the termination of the case by final judgment with right of appeal lost, the Trial Court did not

have jurisdiction to permit an amendment to the Complaint to allege a new basis for jurisdiction.

Rule 15a, Federal Rules of Civil Procedure is alleged by plaintiffs to be the Rule they rely upon. However, Rule 15a clearly does not apply because by its own terms it does not apply to pleadings after judgment and trial, as it makes specific provision for responsive pleadings to make up the issues. After judgment, responsive pleadings are impotent as the trial is over. Thus, Rule 15a applies only to amendments before trial. 3 Moore Fed. Practice, Committee Note of 1937 (a), page 803; Section 15.08, page 827.

3. Should Rule 60, Federal Rules of Civil Procedure, be so construed as to permit the filing by the District Court of a Third Amended Complaint after final judgment, and after the District Court had lost jurisdiction except for the purposes set forth in Rule 60?

Rule 60, Federal Rules of Civil Procedure, is entitled "Relief from Judgment or Order." Pursuant to Rule 60b (4), the defendants properly filed their Motion for relief on the basis that the Judgment is void. However, the plaintiffs' position can not be sustained as to the filing of the Third Amended Complaint under Rule 60a or b, Federal Rules of Civil Procedure. Under examination of Rule 60b, Federal Rules of Civil Procedure, specific instances are required to give that Rule effect in order that action might be taken. The Motion to file the Third Amended Complaint after Judgment is not under one of these provisions. A final Judgment or its supporting record

may not be changed by the Trial Court unless permitted by Rule 60b as it has lost power as it has no jurisdiction. As stated in the Advisory Committee Note (28 U.S.C.A., Rule 6 c, page 311) the purpose of the amendment is to prevent reliance upon the continued existence of terms as a source of power to disturb the finality of a judgment on other grounds than those stated in these Rules.

Rule 60a, Federal Rules of Civil Procedure, applies to clerical mistakes, oversight and omission only while the appeal is pending from the Judgment or the Trial Court has jurisdiction. Secondly, there was no clerical mistake involved here nor was there an oversight or an omission. Jurisdiction was alleged on a diversity basis but not proven at the trial. In addition, diversity jurisdiction was not established as required by 28 USCA 1332. Thus, Rule 60a is not applicable under its very provisions where a new basis of jurisdiction is sought and no error or omission is created. Rule 15b, Federal Rules of Civil Procedure, is not applicable because the issues raised by the Amended Complaint were never tried, and there is no pretense made that the amendment is made for the purpose of conforming to the evidence. As a matter of fact, the plaintiffs had made such a motion to conform to the evidence and had submitted and filed their Second Amended Complaint (23a). See *T.S.C. Motor Freight Lines v. Leonard Truck Line, supra; Kelly v. Delaware River Joint Commission, supra; Rivoli Trucking Corp. v. New York Shipping Association, supra.* Thus, Rule 60 does not authorize the Trial Court's action.

4. Does 28 USCA 1653 authorize the filing of the Third Amended Complaint after final judgment and after the District Court has lost jurisdiction?

> "*Defective allegations* of jurisdiction may be amended, upon terms, *in the trial or appellate courts.*" (Emphasis ours.)

This statute is not applicable for the reason that the case is "not in the Trial or Appellate Courts." As to an action which terminated in the final judgment upon which no Notice of Appeal was filed, the action had terminated and jurisdiction is no longer in the Trial Court. Secondly, the action was not in the "Appellate Court" because no Notice of Appeal had been filed, and, therefore, the case did not rest in that Court.

It is reasonable and logical that once issues have been determined finally and no Notices of Appeal have been filed, the matter is concluded as to a money Judgment, and the validity of that Judgment must be examined at that time. In the present case, all Courts had lost jurisdiction of this Judgment for the purposes of modifying it and for the purpose of amending the Complaint. The only exception is Rule 60, Federal Rules of Civil Procedure and as we have shown, this Rule does not apply because there is no mistake in the Judgment nor is there any "oversight or omission."

In the allegations the Complaint and all of its amendments: Terry & Wright has never been sued pursuant to its obligations upon a bond. It has been sued consistently in all the Amendments to the Complaint on the basis of the construction contract between

Blanchard & Jenkins and Terry & Wright. No allegation is contained in any of the Complaints or Amendments that Terry & Wright is sued as a principal on the bond. Thus, clearly, the only basis for jurisdiction here involved as to Terry & Wright would be on diversity of citizenship. Thus, no jurisdiction ever existed.

As apparent in *Stern* v. *Beer* (C.A. 6th), 200 F. 2d 794, 795 quoted at page 795:

> ". . . Under the foregoing authorities, we are of the opinion that, if jurisdiction actually existed from the facts at the time when the complaint was filed, even though not properly pleaded, the proper construction of Section 1653, Title 28, U. S. Code, is that the formal defect in the pleadings did not deprive the Court of jurisdiction at the time when the action was filed, if such defect was later corrected."

Here, it is conceded that there is no diversity of jurisdiction at the time of the filing of the Complaint. The plaintiffs did not make a technical error, but there simply existed no jurisdiction. As stated in *Moore* v. *Coats Co.* (C.A. 3rd), 270 F. 2d 410, 411, the purpose of 28 USCA 1653 is "to permit amendment broadly to avoid the dismissal of suits on technical grounds." Here, a lack of diversity jurisdiction is actual and not technical. Here, the Miller Act allegations were omitted from the Complaint, and the "defective" allegation goes to diversity of citizenship in not alleging the principal place of business of the plaintiffs. Thus, 28 USCA 1653 does not cover this situation where the allegations are "omitted" and not "defective."

Since the allegations of the Amended Complaint as here filed do not correctly invoke the provisions of the Miller Act clearly as the necessary allegations under 40 USCA 270a and b are not present, the Court cannot be said to have had jurisdiction of the subject matter. Even under the Third Amended Complaint, Terry & Wright is not sued as a principal under the bond and it is not so alleged. Moreover, as will be shown in the next section, necessary jurisdictional allegations are not contained in the Third Amended Complaint. Not until such jurisdiction has been invoked and an action under the Miller Act commenced did the Trial Court have jurisdiction. As was pointed out by Mr. Justice Whittaker, the District Judge, in *In re Market Basket, Inc.*, 122 F. Supp. 321, 322 at page 322:

> "I am wholly without any jurisdiction to determine the merits of the controversy, because no action in respect of the matter has ever been commenced or is pending in this court. Rule 3 of Federal Rules of Civil Procedure, provides 'A civil action is commenced by filing a complaint with the court.'"

Thus, clearly, *28 USCA 1653* does not apply because there were no "defective allegations" since allegations were omitted. Secondly, since the judgment of the District Court was final and the case was not in any way in the Appellate Court for purposes of 28 USCA 1653, the case not not "in" the Trial Court or the Appellate Court at the time of the filing of the Third Amended Complaint. The filing of the

Motion by Terry & Wright under *Rule 60 b* (4), *Federal Rules of Civil Procedure*, on the ground that the judgment was void, did not reopen the matter for the filing of an Amended Complaint but presented to the District Court the question of whether the judgment was void as it had been finalized, and the District Court had no power or jurisdiction to change any of the facts or circumstances or to change the pleadings for it was before it on a limited question only as to whether the judgment was void.

5. Did the District Court properly allow the filing of the Third Amended Complaint when it added a new party plaintiff and when it failed to allege, pursuant to 40 USCA 270 b (b) that the suit had been commenced within one year after the final settlement of the contract obligations between Terry & Wright and the United States engineers?

Concerning Complaints filed under the Miller Act, 40 USCA 270 b (b) provides as follows:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

The Third Amended Complaint filed by the plaintiffs in paragraph 7 stated as follows:

"7. The date of final settlement of the contract between Plaintiffs and Terry & Wright, Inc., was not more than one year prior to December 11, 1959, the original commencement date of these proceedings."

The above allegation in the Third Amended Complaint obviously does not comply with the statute because what is required is the date of the settlement between the United States Engineers and Terry & Wright and not the date of the settlement between Blanchard & Jenkins and Terry & Wright. *Mandel v. U. S.* (C.A. 3rd), 4 F. 2d 629, 632. A well-settled rule of law that if an Amended Complaint, when tendered, does not state a cause of action, its filing should be refused. *Stephens v. Reed* (C.A. 3rd), 12 F. 2d 696, 699. Moreover, the Third Amended Complaint does not sue Terry & Wright as principals on the bond, but on the contract for work to be performed basically between Blanchard & Jenkins and Terry & Wright.

It is also clear that the allegations of the Third Amended Complaint raise new issues that were not tried. First, a new plaintiff was presented, namely the United States. Secondly, the question of whether the bond involved as far as the Federal Insurance Company was concerned, met the requirements of 40 U.S.C. 270 a. In addition, under paragraph 6, it raised the new issue of whether the plaintiffs had been paid in full prior to ninety days after the furnishing of the last labor and material. It further raised another issue under paragraph 7 as to whether the suit was commenced in time. None of these issues were

tried or presented in issue prior to the trial by the allegations contained in the first Complaint and the Second Amended Complaint. The defendants were accordingly denied the right to place these matters in issue. Thus, this is not a case where a trial has been had on the allegations alleged in the Third Amended Complaint required for jurisdiction.

United States Courts are Courts of limited jurisdiction and have held that it is necessary for the plaintiff to allege and prove his right to be in that Court. Such allegations were not contained in any of the Amended Complaints in a proper fashion.

Baglin v. Title Guaranty & Surety Co., 166 F. 356, affirmed C.A. 3rd, 178 F. 682, cited by the Trial Court, is not in point, for here the Court had not lost jurisdiction through a final judgment. *United States v. Barrett*, 135 F. 189, is not in point because the Act has been amended concerning where the suits must be brought. In addition, it has been held in later cases that the interest of the United States is not merely a formal one but that it has an interest in this type of loss to see that its suppliers are paid on public works projects. *U. S. for Use & Benefit of Browne & Bryan Lumber Co. v. Mass. Bonding*, 23 FRD 162; *Barnard-Curtiss Co. v. United States for the use and benefit of D. W. Falls Construction Co.* (C.A. 10th), 252 F. 2d 94, 95. *Burrell v. United States* (C.A. 9th), 147 F. 44, is not in point for the same reason, and it is to be noted that all of these cases relied on by the Trial Court were decided before the present amendments to the Miller Act.

New York Central R. R. Co. v. Kinney, 260 U. S. 340, where jurisdiction of the action was permitted to be changed from an action at common law to an action under the Federal Employers Liability Act by an amendment after the statute of limitations had run is not in point in the present case because the action was still pending in the United States Court. In other words, appeals and Writs of Certiorari had been granted from the Trial Court's Judgment, and there had been no loss of jurisdiction by the United States Courts. Here, such jurisdiction has been lost, except as to specific purposes, set forth in Rule 60, and in no statute or rule is such amendment permitted after all courts have lost jurisdiction for that purpose. The same principle and difference is true in *International Ladies' Garment Workers Union v. Donnelly Garment Co.* (C.A. 8th), 121 F. 2d 561, for there the case had been remanded by the Appellate Court to the Trial Court, and thus the case was still pending in either "the trial court or appellate courts" which is not the case here. Jurisdiction had not been lost by the Trial Court or the Appellate Courts in the *International Ladies' Garment Workers* case, *supra*, as it has been lost here. Moreover, the Trial Court, when the case was returned in 41 F. Supp. 65, granted a new trial because of new issues raised by the change in the bases for jurisdiction. The new trial was the "terms" under 28 USCA 1653. This was not done here by the Trial Court. *See Dollar S. S. Lines, Inc. v. Merz* (C.A. 9th), 68 F. 2d 594, 597.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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MEMORANDUM AND ORDER—Entered June 17, 1963.

This action was commenced December 11, 1959, by the plaintiffs, Hugh D. Blanchard and Cullen Jenkins, partners doing business as Blanchard & Jenkins Construction Company, against Terry & Wright, Inc., and Federal Insurance Company as defendants.

The complaint alleged that defendant Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan, and that defendant Federal Insurance Company was a corporation created under the laws of the State of New York and was a citizen and resident of that state. No reference to Section 1332 of Title 28, United States Code, was made in the complaint although it is apparent that the source of jurisdiction was thought to be in that section as diversity of citizenship and the requisite amount in controversy were alleged. The averments as to diversity failed to allege that the principal place of business of each of the defendants was not in the State of Kentucky. The complaint alleged that defendant Terry & Wright, Inc., had contracted with the United States to build a dam and spillway on the Rough River in the Western District of Kentucky and that defendant Federal Insurance Company, as surety for Terry & Wright, Inc., had executed a bond guaranteeing the performance of the contract by the principal in the bond and guaranteeing payment by the principal for all claims of labor and material used in that contract. It was then alleged that the plaintiffs, Blanchard and Jenkins, contracted with Terry & Wright, Inc., to furnish all filter material in accordance with the prime contract between Terry & Wright, Inc., and the United States.

Defendant Terry & Wright, Inc., admitted the averments of the complaint, except to deny that the plaintiffs had furnished a certain quantity of filter material for

which Terry & Wright, Inc., had failed to pay in full, denied the allegations as to the defendants' indebtedness for equipment that plaintiffs rented to Terry & Wright, Inc., and pleaded a settlement in Accord and Satisfaction of all matters arising out of the subcontract and its execution.

The case came on for trial to a jury on November 21, 1962, which resulted in a verdict for the plaintiffs and judgment was entered for the amount of the verdict on November 23, 1962. November 28, 1962, the defendants moved for a judgment notwithstanding the verdict, in accordance with their motion made at the conclusion of the introduction of all the testimony at the trial, and that motion was overruled March 6, 1963. On March 8, 1963, the defendants moved the Court to dismiss the proceeding for lack of jurisdiction and March 15, 1963, filed a motion to set aside the judgment for want of jurisdiction. The plaintiffs then moved the Court for leave to amend the complaint, asserting that the action arose under the Miller Act, Section 270b of Title 40, and under Section 1352 of Title 28, United States Code.

In their original answer the defendants denied that the Court had jurisdiction of this action and at the trial introduced testimony, not denied, that Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan but had its only and chief place of business in the Western District of Kentucky, which was also the residence of the plaintiffs.

There was no diversity of citizenship between the plaintiffs and defendant Terry & Wright, Inc., as required by Section 1332 of Title 28 and, the complaint having failed to allege that the Federal Insurance Company did not have its principal place of business in the State of Kentucky, there was presumptively no diversity of citizenship there.

Bell v. Gray, DC Ky., 191 F. Supp. 328 (1960), affirmed 6 Cir., 287 F. 2d 410 (1960).

If jurisdiction is absent, the judgment is void. The validity of the judgment in this case depends upon whether jurisdiction on other grounds exists.

The amended complaint tendered by the plaintiffs on April 19, 1963, alleges that the action arises under the provisions of Sections 270a, 270b, and 270c of Title 40, United States Code, and that it was brought pursuant to those sections and Section 1352 of Title 28, United States Code, for the recovery of monies due plaintiffs for labor and material furnished by them in the prosecution of public work of the United States pursuant to the defendants' contract with the United States Army Corps of Engineers, which contract was to be performed within the area of this Court's jurisdiction. Plaintiffs seek to amend by making the United States of America, for the use and benefit of Blanchard and Jenkins, a plaintiff. The plaintiffs further allege that the action was instituted within one year next after the date of final settlement of the contract.

Section 270a of Title 40 requires that before any contract, exceeding $2,000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, there shall be executed by such person a performance bond for the protection of the United States and a payment bond for the protection of all persons supplying labor and material in the prosecution of the work covered by the contract.

Section 270b (b) of Title 40 is as follows:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed **and not elsewhere**, irrespective of the amount

> in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." (Emphasis added.)

The original complaint contained averments of facts sufficient for a proper foundation for the amendment tendered April 10, 1963. The United States as plaintiff for the use and benefit of the plaintiffs Blanchard and Jenkins is a mere nominal or formal party. United States to Use and Benefit of Platten v. Bush Const. Co., D. C. Mich., 109 F. Supp. 378, 380 (1953). Especially is this true in view of the provision of Section 270b (b) limiting the jurisdiction of a suit brought under the Miller Act to the United States District Court for the district wherein the contract was to be performed and not elsewhere.

The Miller Act and its predecessors have received liberal construction. In Baglin v. Title Guaranty & Surety Co., 166 F. 356, affirmed 3 Cir., 178 F. 682 (1909), the trial court permitted an amendment inserting averments concerning citizenship and party plaintiff. At page 361 of the opinion, the trial court said:

> "The defendant denies all liability upon several grounds. First, it is urged that Baglin is only a nominal party, the real interest residing in Heinze, and that it nowhere appears, either on the record or in the notes of testimony, that Heinze possesses the requisite citizenship to give jurisdiction to the Circuit Court. Without stopping to discuss this point, and merely for present purposes assuming it to be well taken, it is a defect that may be remedied by amendment after a trial on the merits, and permission is

hereby given to amend the record within 10 days by marking the suit and the various papers in the cause 'to the use of F. A. Heinze,' and by inserting the proper averments concerning his citizenship."

In United States v. Barrett, 135 F. 189 (1905), the court said that the failure to sue in the name of the United States as plaintiff is "at the worst, a mere formal irregularity, and should not affect either the jurisdiction of the court or the merits of the controversy." It was there held that the United States was merely a modal, formal, and nominal party, and this was said under a predecessor statute to the Miller Act which did not require the action to be filed in the United States District Court in the district where the work was to be performed as does the Miller Act.

In Burrell v. United States, 9 Cir., 147 F. 44 (1906), the court said, "The United States are neither the legal nor equitable plaintiffs in the present action."

The exclusive jurisdiction under the Miller Act is shown in the case of United States v. Aetna Casualty & Surety Company, 2 Cir., 297 F. 2d 665 (1962).

Amendments have been permitted which are comparable to the one tendered in this case, both with respect to the timeliness in which they were offered and the change sought in the nature of the action. In N. Y. Cent. R. R. v. Kinney, 260 U. S. 340 (1922), the jurisdiction of the action was permitted to be changed from an action at common law to an action under the Federal Employers' Liability Act by an amendment and the amendment was allowed after the statute of limitations had run. In International Ladies' Garment W. U. v. Donnelly G. Co., 8 Cir., 121 F. 2d 561 (1941), the court indicated it would approve the trial court's allowance of an amendment changing the theory of

recovery from one under the Sherman Act to an action at common law.

In enacting Section 1653 of Title 28, United States Code, which provides that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts, it was the intention of Congress to permit amendment liberally to avoid dismissal of suits on technical grounds. Moore v. Conte Co., 3 Cir., 270 F. 2d 440 (1959).

For this Court to nullify the efforts and expense of the plaintiffs and defendants which culminated in the judgment based upon the verdict of the jury in this action would be substituting form for substance.

Plaintiffs' motion for leave to amend the complaint is sustained and the third amended complaint tendered with said motion on April 10, 1968, is hereby ordered filed.

Defendant's motion to dismiss this action for want of jurisdiction filed March 8, 1965, and the motion to set aside the judgment for want of jurisdiction filed March 16, 1965, are each and both hereby overruled.

/s/ Roy M. Shelbourne
June 13, 1968 United States District Judge

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No. 15504

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

HUGH D. BLANCHARD and CULLEN JENKINS, d b a Blanchard & Jenkins,

Plaintiffs-Appellees

v.

TERRY & WRIGHT, INC. and FEDERAL INSURANCE COMPANY,

Defendants-Appellants.

APPEAL from District Court of United States, for the Western District of Kentucky, Louisville Division.

OPINION – Decided May 11, 1964 and Filed May 11, 1964.

Before: WELCK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

WELCK, Chief Judge. The complaint was filed in the District Court by a materialman against the principal contractor and his surety to recover for materials and the rental value of equipment in the amount of $51,180.11, furnished the contractor in connection with the performance of his contract with the United States for the construction of a dam and spillway at the Rough River Reservation in Grayson County, Kentucky.

The complaint alleged diversity of citizenship of the plaintiffs and the corporate defendants, but did not state where the principal place of business of either of the defendants was located.

After the lapse of several years, the case came on for trial on its merits before a jury which returned a verdict

in favor of plaintiffs for $17,899.92. Judgment was entered thereon on November 23, 1962. The court denied defendants' timely motion for judgment notwithstanding the verdict on March 6, 1963. On June 17, 1963 the court denied defendants' motion to vacate and set aside the judgment and to dismiss the case for lack of jurisdiction. In this motion to vacate defendants asserted for the first time that the principal place of business of the contractor was Kentucky, which was the plaintiffs' place of residence;[1] that no allegation was made in the complaint as to the principal place of business of the surety which was a foreign corporation. Defendants claimed that there was a presumption of no diversity of citizenship citing *Bell* v. *Gray*, 191 F. Supp. 328, affirmed 287 F. 2d 410 (CA 6). The *Bell* case, however, does not support the proposition for which it was cited.

On April 10, 1963, during the pendency of defendants' motions to vacate and dismiss, plaintiffs filed a motion for leave to file their third amended complaint to specifically invoke jurisdiction under the Miller Act (40 U.S.C. 270 a, b & c) and to change the plaintiffs' part of the caption of the case so that it would read:

> "United States of America for the use and benefit of Hugh D. Blanchard & Cullen Jenkins d b a Blanchard and Jenkins Construction Company,
>
> *Plaintiffs*,
>
> v.
>
> Terry & Wright, Inc., and Federal Insurance Company,
>
> *Defendants*."

[1] Testimony at the trial disclosed that the principal place of business of Terry & Wright, Inc. was in Kentucky.

Opinion

The third amended complaint, tendered for filing with the motion for leave to file, did not change in any respect the substantive allegations setting forth plaintiffs' claim. The court granted the motion for leave to file the third amended complaint on June 17, 1963, and on the same day denied defendants' motions to vacate and dismiss. Defendants appealed from the order denying their motions to vacate and set aside the judgment and dismiss the complaint, and granting plaintiffs leave to amend.

The argument of appellants was that the complaint did not allege nor did the evidence prove diversity jurisdiction and that the judgment was therefore void for lack of jurisdiction. Appellants further contended that the court had no jurisdiction to grant plaintiffs leave to file their third amended complaint and that they can raise the jurisdictional question at any time.

We think that the broad allegations of the complaint were sufficient to confer jurisdiction upon the District Court. Diversity of citizenship and amount were alleged although the principal offices of the defendants were not specifically set forth. It was not claimed here that the principal office of Federal Insurance Company was in Kentucky. If Terry & Wright, Inc. were dismissed from the case there would then be no question that even diversity jurisdiction existed. Appellees are willing to dismiss this defendant if the Court finds it necessary to establish jurisdiction. We think jurisdiction exists even though said defendant remains in the case. More important than the allegations in the complaint concerning diversity of citizenship were the allegations that the contract for the construction of the dam and spillway was with the United States, and that the bond was executed to guarantee the performance of that contract and the payment of all bills for labor and material furnished in connection therewith

In our opinion, these general allegations were sufficient to invoke jurisdiction under the Miller Act without the necessity of referring to the Act by name.

It is true that the name of the United States does not appear in the caption of the complaint, but the caption is not regarded as containing any part of plaintiffs' claim. We must look to the allegations of the complaint in order to determine the nature of plaintiffs' cause of action. *State of Ohio, ex rel. Senea* v. *Swift & Co.*, 270 Fed. 141, 147 (CA 6). There it clearly appears to be a claim cognizable under the Miller Act.

Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act. *United States* v. *Aetna Casualty & Surety Co.*, 297 F. 2d 665 (CA 2). District Courts also have concurrent jurisdiction with the state courts of any action on a bond executed under any law of the United States. 28 U.S.C. 1352. *Continental Casualty Co.* v. *United States*, 305 F. 2d 794 (CA 8); *United States* v. *Aetna Casualty & Surety Co.*, supra. Even though the allegations of the original complaint with respect to jurisdiction of the court were defective, the trial or appellate court had full power to correct them. 28 U.S.C. 1653; *Stern* v. *Beer*, 200 F. 2d 793 (CA 6); *Chicago Stadium Corporation* v. *State of Indiana*, 220 F. 2d 797 (CA 7). Cf. *Moore* v. *Coats Company*, 270 F. 2d 410 (CA 3).

We do not follow the argument that the court had no jurisdiction to grant the amendment. The case was pending in the District Court at the time on defendants' motions to vacate and set aside the judgment and dismiss the complaint for the very defects in the complaint which the amendment permitted by the court corrected. If the court had jurisdiction to pass upon defendants' motions, we can see no reason why the court could not remedy the technical defects of which they were complaining.

Opinion

The third amended complaint did not change the nature of plaintiffs' claim which was to recover for supplies sold to a contractor who had furnished bond under the Miller Act.

In our judgment, the failure to name the United States as a party for the use and benefit of the plaintiffs in the original complaint did not prejudice either the United States or the defendants. Plaintiffs could have named the United States as a party plaintiff without its knowledge or consent. The United States would have had no control over the litigation. The use plaintiffs would be represented by their own lawyers and not by any representative of the Department of Justice. The United States would not be liable for court costs. The claim set forth in the complaint as well as the judgment belonged to the use plaintiffs and not the United States.

We regard the failure to name the United States a party plaintiff in the original complaint at most a formal irregularity, which ought not to affect the jurisdiction of the District Court. *Hendrix Corp. v. American Dredging Co.*, 318 F. 2d 299 (4 A 5). This irregularity was cured by the amendment permitted by the court.

The interest of the United States was merely nominal. *Equitable Surety Co. v. United States, to the use of Miller*, 234 U. S. 443, 457. The use plaintiffs were the real parties in interest.

We find no error in the District Court in denying appellants' motions to set aside the judgment and dismiss the complaint or abuse of discretion in granting leave to file the third amended complaint.

Judgment affirmed.

CAUSE ARGUED AND SUBMITTED—April 4, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

This cause is argued by John P. Sandidge for defendants-appellants and by Edgar A. Zingman for plaintiffs-appellees and is submitted to the Court.

JUDGMENT—Filed May 11, 1964.

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from defendants-appellants the costs on appeal, as itemized below and that execution therefor issue out of said District Court.

Aproved for entry:

(s) Paul C. Weick,

Chief Judge.

STATUTES AND RULES CITED

40 U. S. C. A. 270a

Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

40 U. S. C. A. 270b (a)

Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said con-

tractor within ninety days from the date on which such person did or performed the last of the labor or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

40 U. S. C. A. 270c

Same; right of person furnishing labor or material to copy of bond

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. Aug. 24, 1935, c. 642 § 3, 49 Stat. 794.

28 U. S. C. A. 2107

Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree. . . .

Rule 60, Federal Rules of Civil Procedure

Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a

prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, #1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 15 (a and b) Federal Rules of Civil Procedure

Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an

amended pleading within ten days after service of the motion to the original pleading or within ten days after service of the amended pleading, whichever period is the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) U. S. C. A. Rules of Federal Rules of Civil Procedure.

Unaffected by Expiration of Term. The power of time providing for the doing of an act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Office Supreme Court, U.S.
FILED
JUL 27 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 216

TERRY & WRIGHT, INC. and
FEDERAL INSURANCE COMPANY, Petitioners,

versus

HUGH D. BLANCHARD and CULLEN JENKINS, d/b/a Blanchard & Jenkins Construction Company, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Review by this Court should be denied. The decision of the Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not in conflict with decisions of other United States Circuit Courts of Appeal or of this Court and is not a departure from the accepted and usual course of judicial proceedings.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. _____

TERRY & WRIGHT, INC. and
FEDERAL INSURANCE COMPANY, - - *Petitioners,*

v.

HUGH D. BLANCHARD and CULLEN JENKINS,
d/b/a Blanchard & Jenkins Construction
Company, - - - - - - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I.

OPINIONS OF COURTS BELOW.

The Memorandum and Order of the District Court is unreported and is printed in the Appendix hereto, pages 17-22, and contained in the Certified Record, pages 38a-43a. The Opinion of the Circuit Court of Appeals is printed in the Appendix, pages 23-27, and is unreported at this time. The Opinion of the Circuit Court of Appeals may also be found at the conclusion of the Certified Record.

II.

JURISDICTION.

The jurisdiction of the United States Supreme Court to review by writ of certiorari the decision of the United States Court of Appeals is set forth in 28 U.S.C. 1254.

III.

STATUTES INVOLVED.

The statutory provisions involved in this proceeding are 28 U.S.C. 1653 and 40 U.S.C. 270, all of which are set out in the Appendix at pages 29-31.

IV.

QUESTION PRESENTED.

The "Questions Presented For Review" as set out by Petitioners on page 3 of their Petition for Writ of Certiorari are the same questions which they presented to the United States Court of Appeals for the Sixth Circuit. These questions address themselves to the merits of the case and not to whether certiorari should be granted. Inasmuch as the merits of the Petitioners' appeal are not now before this Court, the Petitioners' "Questions Presented" are premature and will not be dealt with unless and until certiorari is granted by this Court.

V.

THE REASONS RELIED UPON FOR DENIAL OF WRIT.

The Respondents contend that Petitioners' writ of certiorari should be denied for the following reasons:

(1) The decision by the Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not in conflict with decisions of other United States Circuit Courts of Appeal or of this Court.

(2) The decision of the United States Court of Appeals for the Sixth Circuit affirming the Order of the District Court is not a departure from the accepted and usual course of judicial proceedings, and no review by this Court is necessary.

VI.

COUNTER-STATEMENT OF FACTS.

On December 11, 1959, Respondents filed their Complaint against the Petitioner herein, Terry & Wright, Inc., for labor, material and equipment furnished Petitioner by Respondents for the construction of a dam and spillway at the Rough River reservoir in Grayson County, Kentucky under a contract with the United States. Respondents sought by their Complaint to recover upon the bond executed by the Petitioner, Federal Insurance Company, which guaranteed the prompt payment of all claims for labor and materials used in furtherance of the aforementioned contract.

Respondents' Complaint alleged as to jurisdiction the following:

> "1. Plaintiffs are citizens and residents of the State of Kentucky. The Defendant, TERRY & WRIGHT, INC., is a corporation created and existing under the laws of the State of Michigan and is a citizen and resident of said State. The Defendant, FEDERAL INSURANCE COMPANY, is a corporation created and existing under the laws of the State of New York and is a citizen and resident of said State.
>
> "2. The matter in controversy exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs."

Petitioners' Answer expressly admitted the allegations of jurisdiction contained in Respondents' Complaint even though conflicting boilerplate language was employed:

> "1. Terry & Wright, Inc., moves the Court to dismiss plaintiff's complaint because it does not state a cause of action on which relief may be granted and because this Court has no jurisdiction of this cause of action.
>
> "2. For answer to plaintiff's complaint, defendants admit the allegations of paragraphs 1, 2, 3, 4 and 5, and deny every other allegation therein."

Subsequent to the filing of Petitioners' Answer and Counter-claim, Respondents' Reply, Respondents' Amended Complaint and Petitioners' Amended Answer, this action was tried and on November 21, 1962,

a verdict in favor of the Respondents in the amount of Seventeen Thousand Eight Hundred and Eighty-Nine Dollars and Ninety-Two Cents ($17,889.92) was returned by the jury.

On November 23, 1962, the District Court entered a judgment reflecting the jury's verdict received two days earlier. On November 29, 1962, the Petitioners filed a Motion for Judgment under Rule 50(b) of the Federal Rules of Civil Procedure in accordance with their Motion for a Directed Verdict. On March 6, 1963, the District Court entered an Order overruling this Motion. On March 9, 1963, the Petitioners served upon Respondents notice of their intention to move the Court on Friday, March 15, 1963, to dismiss the action because of lack of jurisdiction. This was the first time in the thirty-nine (39) months since the action was filed that the Petitioners directed any attention to this issue.

On March 15, 1963, Petitioners filed a Motion to set aside the Judgment and enter a Judgment for the Petitioners for the reason that the Court lacked jurisdiction of the controversy. During the pendency of Petitioners' motions to vacate and to dismiss, Respondents moved to file a Third Amended Complaint. Respondents' amendment specifically invoked the District Court's jurisdiction under the Miller Act (40 U.S.C. 270). As was stated by the Circuit Court of Appeals in its Opinion, the Third Amended Complaint "... did not change in any respect the substantive allegations setting forth Plaintiffs' claim." On June 17, 1963, the District Court entered an Order overruling

the Motions filed by Petitioners on March 8, 1963 and March 15, 1963, respectively, and sustained the Respondents' Motion to file their Amended Complaint. From the Order dated June 14, 1963 and entered June 17, 1963 refusing to set aside the Judgment as void and permitting the filing of the Third Amended Complaint, the Petitioners filed a Notice of Appeal on June 27, 1963 with the United States Court of Appeals for the Sixth Circuit.

This appeal was briefed and argued before the Sixth Circuit. On May 11, 1964, the United States Court of Appeals for the Sixth Circuit entered its Opinion and Judgment affirming the June 27, 1963 Order of the District Court.

VII.

ARGUMENT.

Review by This Court Should Be Denied. The Decision of the Court of Appeals for the Sixth Circuit Affirming the Order of the District Court Is Not in Conflict With Decisions of Other United States Circuit Courts of Appeal or of This Court and Is Not a Departure From the Accepted and Usual Course of Judicial Proceedings.

There exists no justification whatsoever for the granting of certiorari either on the basis of the Petition or on the basis of any other relevant consideration.

Petitioners first dispute the original jurisdiction of the District Court on the dual theory that either there was incomplete diversity of citizenship or that the original Complaint did not state facts sufficient for a

cause of action under the Miller Act. The objection to the lack of diversity is not well taken because the Respondents' Complaint could have been dismissed on motion of Terry & Wright, Inc., as to Terry & Wright, Inc., the party against whom diversity may have been lacking. The Circuit Court recognized that "if Terry & Wright, Inc., were dismissed from the case there would be no question that even diversity jurisdiction existed."

Petitioners' attack of the Circuit Court's finding that the original Complaint stated a cause of action under the Miller Act and their struggle to find a conflict between the decision of the Circuit Court and the decisions of other jurisdictions is indicative of the extremely slim reed upon which this Petition is premised.

The Respondents' original Complaint was specifically based upon and incorporated the contract between the United States Corps of Engineers and the Petitioners and the statutory bond furnished pursuant to that contract, for all of which the Respondents were subcontractors. The Complaint specifically recited that the contract for the construction of the dam and spillway was with the United States and that the bond was executed to guarantee the performance of that contract and the payment of all bills for labor and materials furnished in connection therewith. Certainly, these allegations were sufficient to invoke jurisdiction under the Miller Act and the Circuit Court so found.

The purpose of the Miller Act is to protect individuals who supply labor and materials for use in government construction and the Act is to be liberally construed in order to effect this purpose. *St. Paul Fire & Marine Ins. Co. v. U. S. for the Use of Dakota Electric Supply Co.*, 309 F. 2d 22 (8th Cir., 1962), cert. den. 83 Sup. Ct. 883, 372 U. S. 936, 9 L. Ed. 2d 767 (1963). To ignore and thereby vitiate the substantive basis of Respondents' claim for labor and materials because of the failure to name the Act under which the action was brought is to put an unjustifiably high premium on form. This is even more true where, as was here the case, the facts tried were identical under any and all of the amendments filed.

The Petitioners assert that the Circuit Court's holding that the failure to join the United States is not prejudicial error since the United States is a nominal party in Miller Act proceedings, is in conflict with *United States Fidelity & Guaranty Co. v. U. S. for the Benefit of Kenyon*, 204 U. S. 349, 51 L. Ed. 516 (1907); *Barnard-Curtiss Co. v. U. S. for the Use and Benefit of D. W. Falls Construction Co.*, 252 F. 2d 94 (10th Cir., 1958); and *United States for the Use and Benefit of Browne and Bryan v. Massachusetts Bonding & Insurance Co.*, 29 FRD 162 (1962).

In *United States Fidelity & Guaranty Co., supra*, it was held that the presence of the United States as a party was sufficient to give the Circuit Court jurisdiction even though the amount in dispute was less than the jurisdictional amount required. In *Barnard-Curtiss Co., supra*, the United States was held to be a

real party in interest under the Miller Act within the meaning of Rule 73(a) of the Federal Rules of Civil Procedure which provides that in any action to which the United States is a party, the time for appeal shall be sixty (60) days from the entry of judgment. The *Barnard-Curtiss Co.* case was subsequently followed on almost identical facts in *United States for the Use and Benefit of Browne and Bryan, supra.*

None of these three cases are in conflict with the Opinion of the Court of Appeals for the Sixth Circuit since none of them treat the question of whether or not the United States need be joined as a party plaintiff in a Miller Act action. Each case determines the impact of joinder of the United States in such proceedings upon the right of appeal and upon the Court's original jurisdiction. The Sixth Circuit was not called upon to decide any of these questions but only whether the United States in fact was required to be joined as a party plaintiff in such proceeding or whether the United States was merely a nominal party whose joinder was not required to sustain a Miller Act action.

There is no serious dispute as to the nature of the interest of the United States in Miller Act proceedings. As was stated in *United States for the Use and Benefit of Browne and Bryan, supra*, a decision upon which the Petitioners rely:

> "In Miller Act proceedings it appears that it cannot be truthfully said that the United States is a 'real party in interest' as that term is generally applied to legal proceedings."

This Court has recognized the nominal status of the United States in such proceedings. In *Equitable Surety Co. v. United States for the Use of W. McMillan Co.*, 234 U. S. 448, 457, 58 L. Ed. 1394 (1914), this Court stated that the United States is a nominal obligee on the general contractor's bond and, with respect to the general contractor and subcontractor, is a mere trustee.

The Petitioners have not and cannot demonstrate any prejudice suffered by reason of the failure of Respondents to name the United States as a party in the original Complaint. The United States, if it had been joined, would not have participated in any manner in the suit. The United States would not have been liable for any costs or expenses of the litigation, 40 U.S.C. 270 b (b). The United States has no interest in Respondents' claim. The failure to join the United States is at most a formal irregularity which does not affect jurisdiction. This formal irregularity was subsequently cured by the Respondents' Third Amended Complaint.

The Petitioners' contention that the Circuit Court erred in finding that the Respondents' original Complaint sufficiently invoked the District Court's jurisdiction is without support and no conflict of authority has been displayed. Therefore, certiorari is not available on this ground.

Petitioners next contend that at the time that Respondents filed their Third Amended Complaint the judgment of November 23, 1962 had become final and, consequently, only under Rule 60 of the Federal Rules

of Civi Procedure could the Complaint be amended. This contention is premised upon the erroneous conclusion that the District Court had lost jurisdiction to permit the filing of the Amended Complaint. However, as the Court of Appeals recognized, if the District Court had jurisdiction to pass upon the Petitioners' motions to vacate and to dismiss, it certainly had jurisdiction to permit the filing of an amended complaint so as to remedy the technical defects of which the Petitioners were complaining.

Counsel for Petitioners rely upon three decisions in support of their position that a complaint may not be amended after a judgment becomes final. Petitioners cite *T.S.C. Motor Freight Lines v. Leonard Truck Lines*, 4 F.R.D. 306 (D.C., La., 1945), for this proposition. In that case the Appellee sought by its amendment to sue for damages in lieu of the action for specific performance initiated earlier. The Appellee's attempt to amend its Complaint to reflect a new cause of action met with disfavor inasmuch as an independent action therefor could have been maintained. This factor persuaded the Court to assume a more restricted posture. 28 U.S.C. § 1653 is not referred to in the case.

Petitioners next cite *Kelly v. Delaware River Joint Commission*, 187 F. 2d 93 (3rd Cir., 1951). This decision was expressly based upon that Appellee's inability to amend "as a matter of right." Furthermore, Appellee's attempt in the *Kelly* case to amend more than eleven months after entry of the judgment did

not increase the Court's receptiveness to Appellee's Motion.

Finally, Petitioners cite *Rivoli Trucking Corp. v. New York Shipping Association*, 167 F. Supp. 943 (D.C.N.Y. 1957), where Appellee attempted to amend more than one year after the judgment had been entered. The Court noted that:

> "There is nothing pending in this district so as to permit Plaintiff to restate or update its Complaint."

It is untenable for Petitioners to contend that *Rivoli* or either of the other two cases cited hereinabove are controlling of the Respondents' right to amend in view of 28 U.S.C. 1653. Additionally, in none of these cases as is here true did the Trial Court have jurisdiction inasmuch as there was nothing pending before it.

There exists no conflict of authority on this point.

Petitioners next contend that 28 U.S.C. 1653 does not permit the filing of Respondents' Third Amended Complaint after a final judgment.

Section 1653 of Title 28 of the United States Code provides:

> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

The legislative intent behind this particular statutory provision was "to permit amendment broadly to avoid the dismissal of suits on technical grounds." *Moore v. Coats Company*, 270 F. 2d 410 (3rd Cir.

1959). The Revisor's Note to the 1948 Judicial Code demonstrates this since it is provided:

> "Section 1653 was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by Section 399 of Title 28, USC, 1940 Ed."

The courts generally recognize that Section 1653 should be applied with liberality. *Moore* v. *Coats Company, supra.*

The cases cited above have been followed uniformly and there can be no doubt relative to the interpretation of Section 1653. For other authority substantiating Respondents' position see: *National Farmers' Union Property & Casualty Co.* v. *Fisher*, 284 F. 2d 421 (8th Cir., 1960); *Garcia* v. *Bevaabe*, 388 F. 2d 60 (1st Cir., 1961); *Burkhart* v. *Bates*, 296 F. 2d 315 (8th Cir., 1961); *Stenhouse* v. *Jacobson, et al.*, 193 F. Supp. 694 (D.C. Cal., 1961); *Allstate Insurance Company* v. *Lumbermen's Mutual Casualty Company*, 204 F. Supp. 83 (D.C. Conn., 1962).

Relative to the question of the propriety of Respondents filing their Third Amended Complaint after judgment, reference should be had to those cases in which amendment was permitted after the statute of limitations had run against Appellee's cause of action: *Zellem* v. *Herring*, 97 F. Supp. 103 (D.C. Pa., 1953), where amendment was permitted after the case had reached the appellate level. *Brooks* v. *Yancey*, 200 F. 2d 663 (1st Cir., 1953). *Fry* v. *Lagna-Western Com-*

pany, 282 F. 2d 97 (8th Cir., 1960); and, further, to a decision in which amendment to show jurisdiction was permitted after the case had reached the Supreme Court, *Molnar* v. *National Broadcasting Company, Inc.*, 231 F. 2d 684 (9th Cir., 1956).

Petitioners argue that 28 USC 1653 was not available to permit the filing of the Third Amended Complaint because the case was not at that time in either the Trial Court or the Appellate Courts. This contention ignores the fact that at the time it was filed, the Trial Court had before it Petitioners' motions to vacate and to dismiss. Surely, Petitioners do not contend the case was "not in the Trial Court" at the time their motions were pending. Petitioners' tenuously drawn distinctions between "omitted allegations" and "defective allegations" of jurisdiction finds no support in the liberal interpretation which has been unanimously accorded 28 U.S.C. 1653. *Moore* v. *Coats Co., supra.* Furthermore, Petitioners offer no conflict between the Circuit Court of Appeals' Opinion and that of other jurisdictions and Respondents respectfully submit that there is none.

Petitioners' final contention questions the sufficiency of the Respondents' Third Amended Complaint. It is claimed new matters were placed in issue by the pleading which were not tried. The new matters which were pled under the Third Amended Complaint were not of a substantive nature and did not add to or detract from Respondents' right to relief from both of the Petitioners. Instead, the amendment merely brought into clearer focus the cause of action originally

pled. The Trial Court certainly did not depart from the accepted course of judicial proceedings in permitting the amendment to be filed and no prejudice was suffered by the Petitioners.

Once again Petitioners cite no authority which conflicts with the Circuit Court's decision.

VIII.

CONCLUSION.

The Petitioners have failed to demonstrate any basis whatsoever for the granting of certiorari by this Court and it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

EDGAR A. ZINGMAN,
J. DAVID GRISSOM,
WYATT, GRAFTON & SLOSS,
300 Marion E. Taylor Building,
Louisville, Kentucky 40202,
Attorneys for Respondents.

IX.

CERTIFICATE OF SERVICE.

I, EDGAR A. ZINGMAN, one of the counsel for the Respondents herein, certify pursuant to Rules 24 and 33(b) of the Rules of this Court that on _____, 1964 five copies of the foregoing Brief were mailed, postage prepaid, to Robert P. Hobson, Attorney for Petitioners, Kentucky Home Life Building, Louisville, Kentucky.

_____

EDGAR A. ZINGMAN

MEMORANDUM AND ORDER—Entered June 17, 1963.

This action was commenced December 11, 1959, by the plaintiffs, Hugh D. Blanchard and Cullen Jenkins, partners doing business as Blanchard & Jenkins Construction Company, against Terry & Wright, Inc., and Federal Insurance Company as defendants.

The complaint alleged that defendant Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan, and that defendant Federal Insurance Company was a corporation created under the laws of the State of New York and was a citizen and resident of that state. No reference to Section 1332 of Title 28, United States Code, was made in the complaint although it is apparent that the source of jurisdiction was thought to be in that section as diversity of citizenship and the requisite amount in controversy were alleged. The averments as to diversity failed to allege that the principal place of business of each of the defendants was not in the State of Kentucky. The complaint alleged that defendant Terry & Wright, Inc., had contracted with the United States to build a dam and spillway on the Rough River in the Western District of Kentucky and that defendant Federal Insurance Company, as surety for Terry & Wright, Inc., had executed a bond guaranteeing the performance of the contract by the principal in the bond and guaranteeing payment by the principal for all claims of labor and material used in that contract. It was then alleged that the plaintiffs, Blanchard and Jenkins, contracted with Terry & Wright, Inc., to furnish all filter material in accordance with the prime contract between Terry & Wright, Inc., and the United States.

Defendant Terry & Wright, Inc., admitted the averments of the complaint, except to deny that the plaintiffs had furnished a certain quantity of filter material for

which Terry & Wright, Inc., had failed to pay in full, denied the allegations as to the defendants' indebtedness for equipment that plaintiffs rented to Terry & Wright, Inc., and pleaded a settlement in Accord and Satisfaction of all matters arising out of the subcontract and its execution.

The case came on for trial to a jury on November 21, 1962, which resulted in a verdict for the plaintiffs and judgment was entered for the amount of the verdict on November 23, 1962. November 28, 1962, the defendants moved for a judgment notwithstanding the verdict, in accordance with their motion made at the conclusion of the introduction of all the testimony at the trial, and that motion was overruled March 6, 1963. On March 8, 1963, the defendants moved the Court to dismiss the proceeding for lack of jurisdiction and March 15, 1963, filed a motion to set aside the judgment for want of jurisdiction. The plaintiffs then moved the Court for leave to amend the complaint, asserting that the action arose under the Miller Act, Section 270b of Title 40, and under Section 1352 of Title 28, United States Code.

In their original answer the defendants denied that the Court had jurisdiction of this action and at the trial introduced testimony, not denied, that Terry & Wright, Inc., was a corporation created under the laws of the State of Michigan but had its only and chief place of business in the Western District of Kentucky, which was also the residence of the plaintiffs.

There was no diversity of citizenship between the plaintiffs and defendant Terry & Wright, Inc., as required by Section 1332 of Title 28 and, the complaint having failed to allege that the Federal Insurance Company did not have its principal place of business in the State of Kentucky, there was presumptively no diversity of citizenship there.

Bell v. Gray, D.C. Ky., 191 F. Supp. 328 (1960), affirmed 6 Cir., 287 F. 2d 410 (1960).

If jurisdiction is absent, the judgment is void. The validity of the judgment in this case depends upon whether jurisdiction on other grounds exists.

The amended complaint tendered by the plaintiffs on April 10, 1963, alleges that the action arises under the provisions of Sections 270a, 270b, and 270c of Title 40, United States Code, and that it was brought pursuant to those sections and Section 1352 of Title 28, United States Code, for the recovery of monies due plaintiffs for labor and material furnished by them in the prosecution of public work of the United States pursuant to the defendants' contract with the United States Army Corps of Engineers, which contract was to be performed within the area of this Court's jurisdiction. Plaintiffs seek to amend by making the United States of America, for the use and benefit of Blanchard and Jenkins, a plaintiff. The plaintiffs further allege that the action was instituted within one year next after the date of final settlement of the contract.

Section 270a of Title 40 requires that before any contract, exceeding $2,000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, there shall be executed by such person a performance bond for the protection of the United States and a payment bond for the protection of all persons supplying labor and material in the prosecution of the work covered by the contract.

Section 270b (b) of Title 40 is as follows:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and not elsewhere, irrespective of the amount

in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit." (Emphasis added.)

The original complaint contained averments of facts sufficient for a proper foundation for the amendment tendered April 10, 1963. The United States as plaintiff for the use and benefit of the plaintiffs Blanchard and Jenkins is a mere nominal or formal party. United States to Use and Benefit of Platten v. Bush Const. Co., D. C. Mich., 109 F. Supp. 378, 380 (1953). Especially is this true in view of the provisions of Section 270b (b) limiting the jurisdiction of a suit brought under the Miller Act to the United States District Court for the district wherein the contract was to be performed and not elsewhere.

The Miller Act and its predecessors have received liberal construction. In Baglin v. Title Guaranty & Surety Co., 166 F. 356, affirmed 3 Cir., 178 F. 682 (1909), the trial court permitted an amendment inserting averments concerning citizenship and party plaintiff. At page 361 of the opinion, the trial court said:

> "The defendant denies all liability upon several grounds. First, it is urged that Baglin is only a nominal party, the real interest residing in Heinze, and that it nowhere appears, either on the record or in the notes of testimony, the Heinze possesses the requisite citizenship to give jurisdiction to the Circuit Court. Without stopping to discuss this point, and merely for present purposes assuming it to be well taken, it is a defect that may be remedied by amendment after a trial on the merits, and permission is

hereby given to amend the record within 10 days by marking the suit and the various papers in the cause 'to the use of F. A. Heinze,' and by inserting the proper averments concerning his citizenship."

In United States v. Barrett, 135 F. 189 (1905), the court said that the failure to sue in the name of the United States as plaintiff is "at the worst, a mere formal irregularity, and should not affect either the jurisdiction of the court or the merits of the controversy." It was there held that the United States was merely a modal, formal, and nominal party, and this was said under a predecessor statute to the Miller Act which did not require the action to be filed in the United States District Court in the district where the work was to be performed as does the Miller Act.

In Burrell v. United States, 9 Cir., 147 F. 44 (1906), the court said, "The United States are neither the legal nor equitable plaintiffs in the present action."

The exclusive jurisdiction under the Miller Act is shown in the case of United States v. Aetna Casualty & Surety Company, 2 Cir., 297 F. 2d 865 (1962).

Amendments have been permitted which are comparable to the one tendered in this case, both with respect to the timeliness in which they were offered and the change sought in the nature of the action. In N. Y. Cent. R. R. v. Kinney, 260 U. S. 340 (1922), the jurisdiction of the action was permitted to be changed from an action at common law to an action under the Federal Employers' Liability Act by an amendment and the amendment was allowed after the statute of limitations had run. In International Ladies' Garment W. U. v. Donnelly G. Co., 8 Cir., 121 F. 2d 561 (1941), the court indicated it would approve the trial court's allowance of an amendment changing the theory of

recovery from one under the Sherman Act to an action at common law.

In enacting Section 1653 of Title 28, United States Code, which provides that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts, it was the intention of Congress to permit amendment broadly to avoid dismissal of suits on technical grounds. Moore v. Coats Co., 3 Cir., 270 F. 2d 419 (1959).

For this Court to nullify the efforts and expense of the plaintiffs and defendants which culminated in the judgment based upon the verdict of the jury in this action would be substituting form for substance.

Plaintiff's motion for leave to amend the complaint is sustained and the third amended complaint tendered with said motion on April 10, 1963, is hereby ordered filed.

Defendants' motion to dismiss this action for want of jurisdiction filed March 8, 1963, and the motion to set aside the judgment for want of jurisdiction filed March 15, 1963, are each and both hereby overruled.

(s) Roy M. Shelbourne,
United States District Judge.

June 14, 1963.

Edgar A. Zingman
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Louisville 2, Kentucky
Attorney for Plaintiffs

Robert P. Hobson
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Louisville 2, Kentucky
Attorney for Defendants

A Copy: Attest
Martin R. Glenn, Clerk
By F. Allen,
Deputy Clerk

No. 15504

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

HUGH D. BLANCHARD and CHELLIS J. [illegible], d/b/a Blanchard & Jenkins, *Plaintiffs-Appellees*, v. TERRY & WRIGHT, INC. and FEDERAL INSURANCE COMPANY, *Defendants-Appellants*.	APPEAL from District Court of United States, for the Western District of Kentucky, Louisville Division.

OPINION Decided May 19, 1964 and Filed May 21, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

WEICK, Chief Judge. The complaint was filed in the District Court by a materialman against the principal contractor and his surety to recover for materials and the rental value of equipment in the amount of $51,180.11, furnished the contractor in connection with the performance of his contract with the United States for the construction of a dam and spillway at the Rough River Reservation in Grayson County, Kentucky.

The complaint alleged diversity of citizenship of the plaintiffs and the corporate defendants, but did not state where the principal place of business of either of the defendants was located.

After the lapse of several years, the case came on for trial on its merits before a jury which returned a verdict

in favor of plaintiffs for $17,899.92. Judgment was entered thereon on November 23, 1962. The court denied defendants' timely motion for judgment notwithstanding the verdict on March 6, 1963. On June 17, 1963 the court denied defendants' motion to vacate and set aside the judgment and to dismiss the case for lack of jurisdiction. In this motion to vacate defendants asserted for the first time that the principal place of business of the contractor was Kentucky, which was the plaintiffs' place of residence; that no allegation was made in the complaint as to the principal place of business of the surety which was a foreign corporation. Defendants claimed that there was a presumption of no diversity of citizenship citing *Bell* v. *Gram*, 191 F. Supp. 328, affirmed 287 F. 2d 410 (6th Cir.). The *Bell* case, however, does not support the proposition for which it was cited.

On April 10, 1963, during the pendency of defendants' motions to vacate and dismiss, plaintiffs filed a motion for leave to file their third amended complaint to specifically invoke jurisdiction under the Miller Act (40 U.S.C. 270 a, b & c) and to change the plaintiffs' part of the caption of the case so that it would read:

> "United States of America for the use and benefit of Hugh D. Blanchard & Allen Jenkins d/b/a Blanchard and Jenkins Construction Company,
>
> *Plaintiffs*,
>
> v.
>
> Teets & Wright, Inc., and Federal Insurance Company,
>
> *Defendants*."

[1] Testimony at the trial disclosed that the principal place of business of Teets & Wright, Inc. was in Kentucky.

Opinion

The third amended complaint, tendered for filing with the motion for leave to file, did not change in any respect the substantive allegations setting forth plaintiffs' claim. The court granted the motion for leave to file the third amended complaint on June 17, 1963, and on the same day, denied defendants' motions to vacate and dismiss. Defendants appealed from the order denying their motions to vacate and set aside the judgment and dismiss the complaint, and granting plaintiffs leave to amend.

The argument of appellants was that the complaint did not allege nor did the evidence prove diversity jurisdiction and that the judgment was therefore void for lack of jurisdiction. Appellants further contended that the court had no jurisdiction to grant plaintiffs leave to file their third amended complaint and that they can raise the jurisdictional question at any time.

We think that the broad allegations of the complaint were sufficient to confer jurisdiction upon the District Court. Diversity of citizenship and amount were alleged although the principal offices of the defendants were not specifically set forth. It was not claimed here that the principal office of Federal Insurance Company was in Kentucky. If Terry & Wright, Inc. were dismissed from the case there would then be no question that even diversity jurisdiction existed. Appellees are willing to dismiss this defendant if the Court finds it necessary to establish jurisdiction. We think jurisdiction exists even though said defendant remains in the case. More important than the allegations in the complaint concerning diversity of citizenship were the allegations that the contract for the construction of the dam and spillway was with the United States, and that the bond was executed to guarantee the performance of that contract and the payment of all bills for labor and material furnished in connection therewith.

In our opinion, the general allegations were sufficient to invoke jurisdiction under the Miller Act without the necessity of referring to the Act by name.

It is true that the name of the United States does not appear in the caption of the complaint, but the caption is not regarded as containing any part of plaintiffs' claim. We must look to the allegations of the Complaint in order to determine the nature of plaintiffs' cause of action. *State of Ohio, ex rel. Seney* v. *Swift & Co.*, 270 Fed. 141, 147 (CA 6). There it clearly appears to be a claim cognizable under the Miller Act.

Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act. *United States* v. *Aetna Casualty & Surety Co.*, 297 F. 2d 665 (CA 2). District Courts also have concurrent jurisdiction with the state courts of any action on a bond executed under any law of the United States. 28 U.S.C. 1352. *Continental Casualty Co.* v. *United States*, 305 F. 2d 794 (CA 8); *United States* v. *Aetna Casualty & Surety Co.*, *supra*. Even though the allegations of the original complaint with respect to jurisdiction of the court were defective, the trial or appellate court had full power to correct them. 28 U.S.C. 1653; *Stern* v. *Beer*, 200 F. 2d 794 (CA 6); *Chicago Stadium Corporation* v. *State of Indiana*, 220 F. 2d 797 (CA 7). Cf. *Moore* v. *Coats-Compton*, 270 F. 2d 410 (CA 3).

We do not follow the argument that the court had no jurisdiction to grant the amendment. The case was pending in the District Court at the time of defendants' motions to vacate and set aside the judgment and dismiss the complaint for the very defects in the complaint which the amendment permitted by the court corrected. If the court had jurisdiction to pass upon defendants' motions, we can see no reason why the court could not remedy the technical defects of which they were complaining.

Opinion

The third amended complaint did not change the nature of plaintiffs' claim which was to recover for supplies sold to a contractor who had furnished bond under the Miller Act.

In our judgment, the failure to name the United States as a party for the use and benefit of the plaintiffs in the original complaint did not prejudice either the United States or the defendants. Plaintiffs could have named the United States as a party plaintiff without its knowledge or consent. The United States would have had no control over the litigation. The use plaintiffs would be represented by their own lawyers and not by any representative of the Department of Justice. The United States would not be liable for court costs. The claim set forth in the complaint as well as the judgment belonged to the use plaintiffs and not the United States.

We regard the failure to name the United States a party plaintiff in the original complaint at most of formal irregularity, which ought not to affect the jurisdiction of the District Court. *Hendry Corp. v. American Dredging Co.*, 318 F. 2d 299 (CA 5). This irregularity was cured by the amendment permitted by the court.

The interest of the United States was merely nominal. *Equitable Surety Co. v. United States to the use of McMillan*, 234 U. S. 448, 457. The use plaintiffs were the real parties in interest.

We find no error of the District Court in denying appellants' motions to set aside the judgment and dismiss the complaint or abuse of discretion in granting leave to file the third amended complaint.

Judgment affirmed.

CAUSE ARGUED AND SUBMITTED—April 4, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

This cause is argued by John P. Sandidge for defendants-appellants and by Edgar A. Zingman for plaintiffs-appellees and is submitted to the Court.

JUDGMENT—Filed May 11, 1964.

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from defendants-appellants the costs on appeal, as itemized below and that execution therefor issue out of said District Court.

Approved for entry:

(s) Paul C. Weick,

Chief Judge

STATUTES AND RULES CITED.

40 U. S. C. 270a

Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such a contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

40 U. S. C. 270b (a)

Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said con-

tractor within ninety days from the date on which such person did or performed the last of the labor or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

40 U. S. C. 270e

Same; right of person furnishing labor or material to copy of bond

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof. Aug. 24, 1935, c. 642 # 3, 49 Stat. 794.